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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

against

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinions Below

The opinion of the Three-Judge District Court for the Southern District of New York is reported at 436 F. Supp. 775 and reproduced in the appendix to the jurisdictional

* In addition to the present chairman of the N.Y. State Racing and Wagering Board, appellants include its other members, Bertram D. Sarafan (chairman at the commencement of this action)

(footnote continued on following page)

statement beginning page J.S. 3a.* The opinion of the District Court granting appellee's motion to convene a three-judge court is not yet reported. It is reproduced beginning at page J.S. 23a.

Jurisdiction

The judgment of the District Court was entered on September 15, 1977. Notice of Appeal was filed September 26, 1977. By order of Mr. Justice Marshall dated December 1, 1977, the time within which to docket this appeal was enlarged to December 5, 1977. The jurisdictional statement was filed on December 5, 1977. Probable jurisdiction was noted on March 20, 1978.

The jurisdiction of this Court to review the judgment by appeal is conferred by 28 U.S.C. § 1253. See, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

Question Presented

Does a statute providing for summary suspension of the occupational license of a harness racing industry participant prior to any hearing and determination of disciplinary charges deny such licensee due process or equal protection of the laws?

(footnote continued from preceding page)

and Joseph H. Boyd, Jr.; the term of former member Eugene J. Keogh, defendant below, having expired. See U.S. Sup. Ct. Rules, Rule 48 (3). Also appealing are Hugh L. Carey and Louis J. Lefkowitz respectively, Governor and Attorney General of the State of New York. The Governor was apparently named as defendant because of his general executive responsibilities, N.Y. Const. Art. IV, § 3 and the Attorney General because of his responsibility to appear in defense of constitutionality of statutes, N.Y. Executive Law § 71.

* Page references to the appendix to the jurisdictional statement are indicated "J.S. a"; page references to the appendix are indicated by numbers followed by "a".

Statute Involved

McKinney's New York Unconsolidated Laws § 8022, 1977-78 Supp., p. 177 provides as follows:

§ 8022. Hearing of refusal or revocation of license

"If the state harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect. The commission may continue such hearing from time to time for the convenience of any of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney-general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witnesses, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The com-

mission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for the action taken by it and a copy thereof shall be served on such applicant or licensee or party fined, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license or in imposing a monetary fine shall be reviewable in the supreme court in the manner provided by the provisions or article seventy-eight of the civil practice law and rules. As amended L.1962, c. 311, § 32; L.1963, c. 6, both eff. Sept. 1, 1963."

Statement of the Case

This is an appeal from a judgment of a three-judge District Court for the Southern District of New York, enjoining enforcement of N.Y. Unconsolidated Laws § 8022 as being in violation of the due process and equal protection clauses of the Fourteenth Amendment (JS. 1a).

Appellee, a licensed trainer of harness race horses (6a), instituted this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), challenging the constitutionality of N.Y. Unconsolidated Laws § 8022 (5a). He claimed that § 8022 denied him the right to due process of law in that it denies a licensee a pre-suspension hearing (9-10a); and, that this statute violated his right to equal protection of the laws because § 8022 precluded stays pending review to harness racing licensees, whereas such a restriction does not apply to thoroughbred racing licensees (11-13a).*

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*"Appellee also contended that the Board's rules, 9 NYCRR §§ 4[illegible].11, 4120.5 and 4120.60, reproduced at page J.S. 5a, esta-

(footnote continued on following page)

On July 10, 1976, appellee Barchi's license to train harness race horses was ordered suspended for 15 days by John F. Fay, presiding steward and judge at Monticello Raceway. This penalty was imposed after traces of the drug "Lasix" had been found in the urine of "Be Alert", one of the horses entrusted to his care which had participated in a race. This followed a routine test performed on June 24, two days after "Be Alert" placed second in the third race at Monticello. The administration of such drug to a harness racing horse within 48 hours is prohibited by New York State Racing and Wagering Board Rule 9 NYCRR 4120.4 (6-7a).

The District Court issued a temporary restraining order on July 13, 1976 enjoining the Board from further execution of its decision (22a). On December 23, 1976, defendants' motion for dismissal of the complaint for lack of subject matter jurisdiction was denied and a three-judge district court was convened, per GOETTEL, J. (2a, J.S. 23a).

The Board urged the three-judge court to abstain until the State courts passed upon its contention that under its construction of § 8022, it was, in fact, authorized to stay the suspension of a harness racing license, relying upon *Carey* v. *Sugar,* 425 U.S. 73 (1976) (J.S. 9a). The court acknowledged this doctrine, but felt that the New York Court of Appeals' decision in *Tappis* v. *N. Y. State Racing and Wagering Board,* 36 N Y 2d 862, 330 N.E.2d 697 (1975), constituted authoritative disposition of the question herein, thus paving the way for federal court adjudication (J.S. 10-11a).

The Court held that N.Y. Unconsol. Laws § 8022 was unconstitutional as violative of Barchi's right to due process under the Fourteenth Amendment because it permitted

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lish a constitutionally improper presumption of guilt with respect to the trainer's responsibility, drugging of horses and making the trainer an "insurer" of his horse's conditions as a matter of law (13-5a). The court sustained the rules on their face (J.S. 20-21a)

revocation or suspension of a harness race horse trainer's license without either a pre-suspension or prompt post-suspension hearing (J.S. 21a).

The District Court looked to the nature of the interest to be protected and held it to be an "interest [which] can be an entitlement subject to due process consideration" (J.S. 13a). The court felt that the statutory protections did not comply wih due process procedures according to the balancing of interests involved, as set forth in *Matthews* v. *Eldridge,* 424 U.S. 319 (1976). The court acknowledged the substantial interest of the state, stating that "in appropriate circumstances [it] justifies summary suspension prior to hearing or formal determination" (J.S. 13-15a). However, the court ruled that the private interest at stake was sufficient to override the state's interest so as to warrant prohibition of the unvariable application of pre-hearing suspension (J.S. 15-16a).

The court also held that the prohibition of stays pending review in the harness racing industry without a parallel prohibition in thoroughbred racing constituted a denial of equal protection because of the state's failure to show a rational basis for this distinction (J.S. 21a).

Statutory History

To understand the regulation of harness racing, particularly in the State of New York, one must recall that prior to the introduction of pari-mutuel betting in 1940, it was essentially an amateur sport conducted at county fairs for small purses, *Interim Report of the N.Y. State Joint Legislative Committee to Study All Laws, Rules and Regulations Relative to Horse Racing in New York State,* 1952 N.Y. Legis. Doc., No. 49 (hereinafter Legislative Report) p. 75. When pari-mutuel betting was established, the Legislature essentially entrusted the regulation of harness racing, including the adoption of rules, to the United States Trotting

Association, a private national organization created in 1932 by a group of wealthy sportsmen, to maintain breeding records and to promte the sport, *Id.,* pp. 23, 75. Thus the Legislature followed the pattern established for thoroughbred racing, which, by statute, was conducted under the aegis of the Jockey Club, *Id.,* p. 23. See *Grannan* v. *Westchester Racing Assn.,* 153 N.Y. 449, 47 N.E. 896 (1897).

In contrast to thoroughbred racing tracks which are operated by non-profit corporations organized for the "improvement of the breed", N.Y. Unconsol. Laws § 7902, parimutuel harness tracks have always been operated for profit. By 1951, they had grown into multi-million dollar enterprises, Legislative Report, p. 73.

The decision of the New York Court of Appeals in *Fink* v. *Cole,* 302 N.Y. 216, 97 N.E. 2d 873 (1951), holding that the delegation of regulatory power over thoroughbred racing to the Jockey Club to be a violation of the State constitution, forced the Legislature to take immediate action. It enacted direct state supervision over racing, L. 1951 c. 324 and established joint legislative committee to conduct a comprehensive study of all aspects of horse racing in the State of New York, Legislative Report, pp. 9-10. *Regulation and Control of Harness Racing in State,* 1954 N.Y. Legis. Doc. No. 86, p. 5.

Thus the stringent licensing and disciplinary provisions which govern harness racing in the State of New York, including the provisions for summary suspension of a licensee pending a hearing on disciplinary charges are part of a comprehensive legislative treatment of the subject, prompted by a demonstrated need for stern, even Draconian measures.

Definitive regulation of harness racing was not accomplished, however, until after scandal and violence had surfaced in the industry. Precipitated by the murder of two officials of a union representing harness track employees in August, 1953, Governor Dewey, acting under N.Y. Execu-

tive Law § 6 (known as the Moreland Act), set up a commission to inquire into specific charges of conflict of interest and labor racketeering as well as the general regulation of harness racing, *Report of the New York State Commission to Study, Examine and Investigate State Agencies in Relation to Pari-Mutuel Harness Racing to Hon. Thomas E. Dewey, Governor of the State of New York, May 6, 1954* (hereinafter "Moreland Commission Report"), 1954 Public Papers of Gov. Dewey, pp. 505, et seq., at 507.

In addition to presenting the evidence regarding the conflict of interest situation, Id. at 507 and its findings on the corruption existing within the harness employee union, particularly with regard to its welfare fund, Id. at 509, the Commission, after extensive investigation, including an examination of racing statutes and rules of all the states of the union, as well as the rules of the U.S. Trotting Association, Id. at 510, recommended major changes in the harness racing laws, *Id.*, 509-512.

> The Commission was conscious of the necessity for the adoption of new legislation during the 1954 session of the Legislature if any substantial steps were to be taken to remedy the existing conditions during the 1954 racing season. The Commission felt that unless prompt steps were taken, pari-mutuel harness racing during this year might be jeopardized, with consequent loss of substantial revenue by the State. Id. at 511.

The Commission's recommendations, enacted as Chapters 5, 112, 356, 387, 411 and 510-516 of the Laws of 1954 considerably tightened State regulation over harness racing, Id. at 511-512, and included the provisions of Unconsol. Laws § 8022 held unconstitutional by the District Court, L. 1954 C. 510 § 8.

In recommending adoption of the Moreland Commission's recommendations, Governor Dewey, in a message to the Legislature noted that the powers he proposed to give to the Harness Racing Commission "are admittedly severe and far reaching. I know of no other situation except this

special type of government-granted monopoly in which they would be warranted and here I believe they are necessary," *Message of the Governor in relation to Regulation and Control of Harness Racing in State,* 1954 N.Y. Legis. Doc. No. 86, p. 5.

In 1973, the Legislature in an effort to promote economy and improve administrative performance created the present State Racing and Wagering Board, which took over administration both of thoroughbred racing and harness racing [inter alia], although preserved the facade of both separate commissions, N.Y. Unconsol. L. § 7951 as added by L. 1973 chaps. 346, 347. But for the purposes of regulation, the two sports are separately provided for and administered.

The extent of the exercise of this authority to suspend is unclear at this date. Both in the sport of harness racing (Unconsol. Laws, § 8022) and thoroughbred racing (Id. § 7915), the Legislature has provided for this authority. However subsequently the Legislature enacted the Administrative Procedure Act which became effective September 1, 1976. Section 401(3) of that Act provides for authority to suspend if the public health, safety or welfare so requires. See J.S. p. 8. At the same time the Legislature in § 102 of that Act excluded certain agencies specifically and others by description from the requirements of § 401 (3) of the Act. In the *Matter of Gerard* v. *Barry,* 59 AD 2d 901, —— N.Y.S. 2d ——, which involved suspension in thoroughbred racing, the Appellate Division, Second Department, ruled that it was jurisdictionally necessary for the Racing Board in imposing a suspension to comply, nevertheless, with § 401(3) of the State Administrative Procedure Act.

The State has taken the position that the Appellate Division mistakenly applied the requirements of N.Y. SAPA § 401(3) to the *Gerard* case ignoring the controlling mandate of N.Y. Uncons. L. § 7915. The requirements of N.Y. SAPA § 401, on their face, do not apply since Article 4 ap-

plies only when "licensing is required by statute to be preceded by notice and opportunity for hearing" (N.Y. SAPA § 401[1]). Uncons. L. § 7915(3) does not require such prior notice and hearing. This question of State law remains open to date.*

Summary of Argument

I.

A license to work in a regulated industry or to engage in an activity supervised by the State, particularly in that involved on this appeal, may be summarily suspended prior to a hearing, when the legislative intent to protect the public interest by the provision is manifest as here, *Arnett* v. *Kennedy,* 416 U.S. 134, 152-154 (1974). It has long been recognized that where the statute (here N.Y. Unconsol. L. § 8022) gives an opportunity for a prompt hearing, following the administrative action this satisfies the requirements of due process, *Dixon* v. *Love,* 431 U.S. 105 (1977); *Mathews* v. *Eldridge,* 424 U.S. 236 (1976); *Arnett* v. *Kennedy, supra.*

Even if the licensee were entitled to some informal type of hearing, this was satisfied in the instant case, *Goss* v. *Lopez,* 419 U.S. 565 (1975).

II.

Whatever distinctions are made in the racing statutes between thoroughbred and harness racing are rationally based and therefore should have been upheld by the district court, under its own expressed standard of analysis. In any event, the practice of the appellant Board is to treat thoroughbred and harness licensees substantially alike in disciplinary matters.

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* The New York SAPA is derived from the widely-adopted Model State Administrative Procedure Act. See Vol. 13, Unif. Laws Ann. and McKinney's, N.Y. State Administrative Procedure Act, p. 1 (1977).

POINT I

A pre-hearing suspension of an occupational license in a strictly regulated industry conforms to the requirements of due process of law. The appellee's fifteen day suspension was not subject to this constitutional objection.

Horse racing is an industry long recognized to be subject to the state's police power, *Western Turf Ass'n* v. *Greenberg,* 204 U.S. 354, 363 (1907). Moreover, in the State of New York, were it not for special legislative dispensation, horse racing would be illegal. N.Y. Const., Art. I, § 9, *Ailano* v. *Westchester Racing Ass'n,* 265 App. Div. 225, 229, 38 N.Y.S. 2d 741, 745 (2d Dept., 1942).

Thus, appellee's privilege to work as a harness horse trainer is inextricably linked to and limited by the statute which legalized this activity. As we showed in our outline of the legislative history, pp. 7-9 *supra,* it was a statute drawn with particular strictness in response to a demonstrated need to protect the integrity of racing and the State's revenues against fraud, conflict of interest, racketeering and violence. Having chosen to work in this strictly regulated industry and having accepted the benefits of a license, appellee should be precluded from challenging the conditions of his licensure, including the procedures under which he is subject to being disciplined. *Arnett* v. *Kennedy,* 416 U.S. 134, 152-154 (plurality opinion) (1974).

Pursuant to the statute (Unconsol. Laws § 8022) appellee could have received a full, quasi-judicial hearing within a few days. He never, requested a hearing: instead, he commenced this injunctive action. As *Dixon* v. *Love,* 431 U.S. 105 (1977), teaches, such a statute which authorizes the summary suspension of a license to engage in an occupation or other activity which is subject to strict public regulation, but with an opportunity for a prompt hear-

ing before the licensing authority, has long been recognized as conforming to the requirements of due process.

In *Dixon,* this Court upheld a statute authorizing the summary suspension of a driver's license where the operator has been repeatedly convicted of traffic infractions, where he could receive a hearing within twenty days, 431 U.S. at 109. While § 8022 provides for a "prompt" hearing and a determination within thirty days, the record shows that a hearing could be scheduled within a few days of a demand, Transcript, May 4, 1977, p. 29.

Dixon is only one of the latest in a series of cases decided by this Court which demonstrates the error in the judgment below.

It is a doctrine well-established by this Court that "due process, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 at 895 (1961). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471 at 481 (1972). With regard to the deprivation of a "liberty" or "property" interest, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews* v. *Eldridge, supra,* 424 U.S. at 333 (1976).

Thus, due process does not require a hearing "in every conceivable case of government impairment of private interest," *Cafeteria Workers* v. *McElroy, supra,* 367 U.S. at 894; *Stanley* v. *Illinois,* 405 U.S. 645, 650 (1971), nor is it a rigid requirement that there be a hearing prior to the termination by the state of every liberty interest or propetry right protected by the Constitution. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972).

This Court has repeatedly held that an opportunity to be heard need not be given until some time after such deprivation. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), gov-

erning discipline of civil servants; *Mathews* v. *Eldridge,* 424 U.S. 236 (1976), governing the discontinuance of disability benefits; *Montayne* v. *Haymes,* 427 U.S. 236 (1976) and *Meachum* v. *Fano,* 427 U.S. 215 (1976), governing prison transfers; *Ingraham* v. *Wright,* 430 U.S. 657 (1976), governing corporal punishment in the schools and *Dixon* v. *Love, supra,* all authorized the imposition of sanctions prior to a hearing. Even in *Goss* v. *Lopez,* 419 U.S. 565 (1975), which limited the right to suspend pupils from school, this Court authorized summary suspension where necessary to protect the safety of persons and property.

This is in clear contrast to those limited circumstances where this Court required a hearing prior to the deprivation of a protected interest, see, e.g., *Goldberg* v. *Kelley,* 397 U.S. 254 (1970), involving the termination of welfare benefits, and *Bell* v. *Burson,* 402 U.S. 535 (1971), which prohibited the summary suspension of a driver's license for failure to post security sufficient to satisfy an unadjudicated tort claim. Such decisions are the exception.

Goldberg v. *Kelley* reflects a special concern for the destitute who depend upon public assistance for the barest essentials of life.

Bell v. *Burson* recognizes the importance of the liberty to travel which is embodied in a driver's license; a liberty which is preferred over the unadjudicated claim of a civil litigant. Similar considerations in protecting the property of civil defendants from arbitrary interference prevailed in *Fuentes* v. *Shevin,* 407 U.S. 67, 90 (1972), in which a preseizure hearing was required for the issuance of a writ of replevin; *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), which precluded pre-judgment wage garnishment. But, see *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 606, 607 *et seq.,* and cases cited therein (1974), which, distinguishing *Fuentes* and *Sniadach* upheld the sequestration in favor of the holder of a conditional sales contract where the statute

provided for a prompt opportunity to seek dissolution of the writ.

An examination of these cases demonstrates the correctness of the decisions of the two United States Court of Appeals which have already ruled that the state interest in regulating the racing industry outweighs the licensee's interest in obtaining a hearing prior to imposition of disciplinary action, *Ruane* v. *N.Y. State Racing & Wagering Board,* 532 F. 2d 860 (2d Cir., 1976), which upheld the summary imposition of fines on jockeys for failing to fulfill riding engagements and *Hubel* v. *West Virginia Racing Comm.,* 513 F. 2d 240 (4th Cir., 1975). See also, *Gilmour* v. *N.Y. State Racing & Wagering Board,* 405 F. Supp. 458 (S.D.N.Y., 1975). In *Gilmour,* District Judge Edward Weinfeld, reviewed the sometimes stormy history of harness racing, 405 F. Supp. at 460-461; and found the informal conference-type "opportunity to be heard" afforded to appellee herein (6-7a), as constitutionally adequate, *ibid.* See also: *Goss* v. *Lopez, supra;* Friendly, "Some kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). See also: *Board of Curators, etc.* v. *Horowitz,* ——— U.S. ———, 46 U.S.L.W. 4179, 4180-4181 (March 1, 1978) which upheld an academic dismissal from a state-operated medical school, in which this Court assumed that whatever liberty interest the student may have had in pursuing a chosen career was satisfied by such informal procedures.

The District Court, perhaps under constraint of the Second Circuit's *Ruane* decision, *supra,* and the persuasiveness of Judge Weinfeld's reasoning in *Gilmour,* gave lip service to *Hubel* v. *West Virginia Racing Commission, supra.* However, by attempting to draw factual distinctions that would show pre-hearing sanctions to be inappropriate (J.S. 15a, *et seq.*), that court completely ignored the holding of *Hubel* that a state may, under *all* circumstances, despite any loss that a licensee might incur, provide

for an absolute pre-hearing suspension rule for racing licensees.

> "The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized parimutuel betting and protecting patrons of the sport from being defrauded. Collectively, these interests, we think, justify the severe penalty of disqualifying a horse that has been drugged, its trainer and perhaps its owner, from further participation in legalized racing until the matter can be heard and determined and an appropriate final sanction formulated. The combination of strict liability, imposed by Rule 793, and immediate suspension without the possibility of stay, deters tampering and promotes care. The combination also removes from racing those who have proved either unable or unwilling to protect their horses from unauthorized drugs." *Hubel, supra,* 513 F. 2d at 243.

It is of no constitutional consequence that the minimal delay between the licensee's suspension and the final disposition of the charges may result in an irretrievable loss of income. Unlike the welfare recipients in *Goldberg* v. *Kelley, supra,* the only case in which this Court has imposed a full quasi-judicial hearing upon the state prior to the deprivation of a public benefit, appellee voluntarily chose to work in the racing industry. The Legislature in permitting this otherwise illegal activity has determined that possible irreparable injury must be subordinated to the public interest in the proper conduct of the regulated activity. Faced with a similar claim of irreparable injury; that the collection of certain taxes claimed by the federal government *would destroy a business,* this Court unanimously refused to enjoin such collection, *Enochs* v.

William Packing & Navigation Co., Inc., 370 U.S. 1, 6 (1962). Likewise, in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), petitioner university sought injunctive relief to prevent revocation of its tax-exempt status, alleging irreparable injury in the form of income tax liability and loss of irretrievable contributions. In affirming the Fourth Circuit's decision that the suit was barred by the anti-injunction act, § 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 7421(a), this Court held that the impermissibility of a pre-enforcement injunction did not constitute a denial of due process, despite the alleged irreparable injury, pending resort to alternative procedures for review. In noting petitioner's alternative remedies, available after revocation of its tax-exempt status, the Court stated:

> "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different . . . we do not say that these [post enforcement] avenues of review are the best that can be devised. They present serious problems of delay, during which the flow of donations to an organization will be impaired and *in some cases perhaps even terminated* . . . [A]lthough the Congressional restriction to post enforcement review may place an organization claiming tax-exempt status in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities *in light of the powerful government interest* in protecting the administration of the tax system from premature judicial interference . . . and of the opportunities for review that are available. (*Bob Jones University* v. *Simon, supra,* 416 U.S. at 746-748)" (citations omitted) (emphasis added).

The economic health of the racing industry and the public revenues it generates depends on its acceptance by the public as a fair and honest sport. New York and a

number of other states, have enacted statutes designed to achieve this purpose, including provisions for swift action in cases of suspected violations of law or racing rules.*

The dependence of the State's revenue upon this acceptance is evidenced by the legislative declaration accompanying the enactment of a revised pari-mutuel revenue provision, L. 1977, c. 267 § 1 reading in part:

> "The Legislature further declares that the revenue the state has received from pari-mutuel betting since its inception has been and is a basic necessity to the support of the state and local governments, and that the large amount of real estate and school tax monies paid by the tracks and horse breeding farms is significantly important to taxpayers in local communities, that the large number of persons employed in the many fields of endeavor that provide the horses for the tracks and breeding farms, and by their supportive suppliers con-jointly constitute an intrinsic segment of the state's economy."

Whatever personal hardship, if any, may result from a short pre-hearing suspension, we have demonstrated that such a procedure is necessary to protect the integrity of racing, its public acceptability and the State's revenues and is well within the parameters of due process.

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* See J.S. at p. 5. In addition, a subsequent survey of state racing commissions indicates summary suspensions by stewards pending review authorized in California, Cal. Adm. Code, Title 4, Chap. 4, Rule 1761 (discretion to grant stay available); Colorado, (discretionary stay available) CRS §§ 12-60-105.5(4)(b)(6); 24-4-104(4); Florida, Fla. Adm. Code 7E-107(7) (discretionary judicial stay available); Kentucky (thoroughbred racing) Rules of Racing § 2, New Hampshire, (horse) Rules of Racing §§ 244, 251; (greyhound) by administrative interpetation of rules and by consent of license applicant, letter from Counsel, N.H. Greyhound Racing Comm. 4/3/78. However, automatic stays from stewards' rulings are granted in Kentucky for harness licensees, Ky. Adm. Rules 1:105 §§ 7, 7(1) Delaware, Harness Racing Comm. Rules, Rule 2(d) and Ohio, ORC § 3769.091.

We submit that the unanimous memorandum opinion of the New York Court of Appeals in *Matter of Tappie* v. *New York Stock Racing and Wagering Board,* 36 NY.2d 862, 331 N.E.2d 697, 370 N.Y.S.2d 972 (1975) is unassailable.

> "The compelling and substantiated State interest involved in maintaining discipline among trainers and owners . . . justifies on the spot sanctions and penalties in advance of hearings, and the procedure here followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clause of the Federal and State Constitutions. (*Matter of Sanford* v. *Rockefeller,* 35 NY2d 547; *Matter of Jerry* v. *Board of Educ. of City School Dist. of Syracuse,* 35 NY2d 534; cf. *Arnett* v. *Kennedy,* 416 U.S. 134.)"

It is to be noted that the above cited *Sanford* case was dismissed upon appeal by this Court "for want of a substantial federal question." (421 U.S. 973, 95 S. Ct. 1972 [1975].) sub nom. *Sanford* v. *Carey.*

Following the *Tappis* and *Sanford* cases, the New York Court of Appeals in a precursor to *Dixon* v. *Love, supra,* upheld mandatory license revocations after speeding convictions in *Matter of Horodner* v. *Fisher,* 38 NY2d 680, 345 N.E. 2d 571, 382 N.Y.S.2d 28 and this Court dismissed the appeal without dissent for "want of a substantial federal question," 429 U.S. 802 (1976).

Here the District Court exhibited unusual insensitivity to the exercise of this authority in such cases as that involving appellee. The participation of a drugged horse in a horse race amounts to an effort to upset the betting probabilities, illegally to the detriment of the vast number of persons at the track as paid patrons, but also those who patronize off-track betting, involving very substantial sums of money, See *Matter of Sullivan Harness Racing Assn.* v. *Glasser,* 30 N.Y. 2d 269, 283 N.E. 2d 603, 332 N.Y.S. 2d

622 (1972). It is also a fraud on the other participants in the particular race. The insistence therefore of the District Court that one who may be responsible for such blatant fraud upon the public and the other participants must be permitted to continue to participate in racing pending the completion of an adversary hearing upon charges, is a gross disservice to the State and to the regulation of this sport, and other regulated sports; in New York and throughout the nation. The drugging of race horses cannot be tolerated. *Matter of Smith* v. *Cole,* 270 App. Div. 675, 62 N.Y.S. 2d 226 (1946), and here it is an undisputed fact that there was detection of such drugging after the completion of a particular race.•

POINT II

The equal protection claim as found by the District Court is without any tenable merit.

The District Court specifically ruled that any distinction in the treatment of thoroughbred and harness licensees would be upheld if justified by a rational basis, J.S. 18a. However, it took constitutional umbrage in a particularistic distinction between suspensions directed under the thor-

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• If, as the Appellate Division, Second Department held in *Gerard, supra,* the requirement in N.Y. State Administrative Procedure Act § 401(3) is applicable to the suspension provisions in Unconsol. Laws § 8022, the imposition of such a suspension must be accompanied by a finding that public welfare requires such action. It has been the position of the State that a suspension obviously reflects a finding of public welfare, in a "drugged horse" case since the participation of a drugged horse in a race is anathema to honest horse racing.

The same court has applied *Gerard* to the suspension of a doctor from treatment of workmen under the Workmen's Compensation Law because of fraud, *Miller* v. *Cooperman,* —— A.D. 2d ——, —— N.Y.S.2d —— (2d Dep't, March 15, 1978). As we have noted, motions for leave to appeal in both cases are pending in the New York Court of Appeals.

oughbred racing law and that under the harness racing law. Under the former, suspensions are made after the hearing on charges or appeal to the administrative body, N Y. Unconsol. Laws § 7915. Under the harness racing law, the suspension or revocation is a firm administrative disposition unless the licensee requests a hearing, *Id.* § 8022. The District Court criticized as constitutionally defective the statement in § 8022 that pending the hearing the disposition shall remain in effect.

This procedure, in line with that described by this Court in *Arnett* v. *Kennedy, supra,* is in recognition of the differences in treatment by the State of the two sports, which, throughout their history have received different treatment, *Roosevelt Raceway* v. *County of Nassau,* 18 N.Y. 2d 30, 218 N.E. 2d 539, 271 N.Y.S.2d 662 (1966), app. dis. 385 U.S. 453 (1967); *National Ass'n of Harness Drivers* v. *New York State Racing Commission,* 57 Misc 2d 135, 291 N.Y.S. 2d 475 (Sup. Ct. N.Y. Co. 1968). Thus the statutory differences should have been upheld, see e.g., *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973).

To compound the error, the district court overlooked the appellants' evidence that the alleged distinctions in the treatment of thoroughbred and harness licencees were illusory. See affidavit submitted by the Board's chief counsel and chief steward to the district court (34a; J.S. 28a) to the effect that harness and thoroughbred licensees were treated alike in disciplinary matters and that in fact, the Board does, where appropriate, stay or suspend a penalty pending administrative review; and counsel's offer of proof as to the manner in which the Board construed the racing statutes, Transcript of May 4, 1977, pp. 27-30.

At the very least, the district court should not have awarded judgment to plaintiff without further evidentiary hearings, Fed. R. Civ. P., Rule 56(c)(d).

CONCLUSION

The judgment appealed from should be reversed.

Dated: New York, New York
May 22, 1978

Respectfully submitted,

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